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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0608-PC-445
	)	
BILLY WAYNE JULIAN,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Fredrick Spencer, Special Judge
Cause No. 48D03-0204-FB-107

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The State of Indiana appeals the grant of post-conviction relief to Billy Wayne Julian. We affirm.

FACTS AND PROCEDURAL HISTORY

In the late evening of March 11, 2001, three or more individuals broke into the Frankton High School. They obtained an oxyacetylene torch from the industrial arts classroom and went to the main office. They used the torch in an attempt to open a safe where prescription drugs and money were stored. During the failed attempt to open the safe, molten steel dripped onto the carpet, causing a fire. The individuals fled the school. The fire caused over one million dollars of damage to the school.

Authorities came to suspect Julian, Josh Rider, and Jordan Haulk. Julian was charged with arson as a Class B felony,[1] burglary as a Class C felony,[2] and attempted theft as a Class D felony.[3] A jury found Julian guilty of all charges on March 14, 2003. The trial court sentenced him to concurrent terms totaling fifteen years. We affirmed. *Julian v. State*, 811 N.E.2d 392 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 977 (Ind. 2004).

In October 2005, Julian filed an amended petition for post-conviction relief. He alleged the State failed to reveal exculpatory evidence, relied on perjured testimony, and failed to properly preserve potentially exculpatory evidence. Specifically, Julian alleged his rights had been violated because:

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[1] Ind. Code § 35-43-1-1(a)(1).
[2] Ind. Code § 35-43-2-1.
[3] Ind. Code § 35-43-4-2(a). Julian was also charged with criminal mischief as a Class C felony, Ind. Code § 35-43-1-2(b). His conviction was vacated on double jeopardy grounds by the trial court during his sentencing hearing.

> Jeffrey Scott Brooks, a key state witness who testified that he was at the Frankton High School just prior to the fire and placed the petitioner at the scene of the fire moments before the fire started, was on home detention on the date of the fire and could not have been at the Frankton High School.

(Appellant's App. at 18-19.)

On May 5, 2006, the post-conviction court found:

> **ORDER GRANTING POST-CONVICTION RELIEF**
>
> * * * * *
>
> The single issue that clearly is dispositive is as follows: The State did not disclose to the defense information that they knew or should have known that State's witness Jeffrey Scott Brooks was on home detention on March 11, 2001, and thus could not have been at the school and could not have seen what he testified about at Julian's trial.
>
> The Court's records reflect that the defense made four requests for Brook's [sic] criminal history which was finally supplied by searching the Sheriff's Department data base. No reference to Brooks being on In Home was supplied to the defense.
>
> The State urges that the Court find that the In Home monitoring equipment was faulty or that the clock was incorrect. This is certainly possible, but the unrebutted and unchallenged affidavit from the home detention administrator established that Brook's [sic] trial testimony is impossible. Brooks is either mistaken or lying. The evidence was crucial to the defense and undoubtedly would likely have resulted in a different trial result as Brooks is said to be the only eyewitness placing Julian at the school; this information is without question exculpatory and of tremendous value.
>
> The records of the Madison Circuit Court in Cause No. 48C01-9712-CF-267 reveal that Brooks was sentenced on June 6, 2001, and that his probation was to "commence at the conclusion of his home detention." Prosecutor Cummings himself[4] was present and participated in the sentencing dialogue. Doug Long [Julian's defense counsel] was not. Brooks testified on March 28, 2001, when he pleaded guilty to a handgun charge that he lived at 102 South Canal, Alexandria. When he was sentenced on June 6, 2001, he testified he lived at 513 E. Plum, Frankton.

[4] The CCS indicates Deputy Prosecutor Michael Chambers, not Prosecutor Cummings, represented the State at this hearing.

> Please see Miller vs. Pate 386 US 1 (1967); Alcorta vs. Texas 355 US 28 (1957), Kyles vs. Whitley 115 S. Ct. 1955 (1995), Prewitt vs. State 819 N.E.2d 406.
>
> The Petition for Post-Conviction Relief is granted; Julian's convictions are set aside, abrogated and rescinded; he is ordered released from incarceration on his own recognizance and the case is returned to Judge Newman for further proceedings.
>
> SO ORDERED THIS 5th DAY OF MAY, 2006.
>
> /s/ Fredrick R. Spencer
>
> Special Judge

(*Id.* at 52-54) (footnote added).

DISCUSSION AND DECISION

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002), *reh'g denied, cert. denied* 537 U.S. 1122 (2003); *see also* Ind. Post-Conviction Rule 1(1)(a). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. P-C.R. 1(5).

When the State appeals a grant of post-conviction relief, we apply the "clearly erroneous" standard of review prescribed in Ind. Trial Rule 52(A). *State v. Jones*, 783 N.E.2d 784, 787 (Ind. Ct. App. 2003). We neither reweigh the evidence nor determine the credibility of witnesses. *Id.* We consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. *Id.* We will reverse only on a showing of clear error, that is, error that "leaves us with a definite and

firm conviction that a mistake has been made." *Id.* The judgment of the post-conviction court granting relief will be affirmed if "there is any way" the court could have reached its decision. *Id.* at 787-88.

The State has an affirmative duty to disclose evidence favorable to a criminal defendant. *Badelle v. State*, 754 N.E.2d 510, 525 (Ind. Ct. App. 2001), *trans. denied* 761 N.E.2d 423 (Ind. 2001). In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To prevail on a *Brady* claim, a defendant must establish: (1) the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material to an issue at trial. *Prewitt v. State*, 819 N.E.2d 393, 401 (Ind. Ct. App. 2004), *trans. denied* 831 N.E.2d 739 (Ind. 2005).

Evidence is not suppressed and the State will not be found to have suppressed material information when the defendant has access to the evidence before trial by the exercise of reasonable diligence. *Id.* at 402. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

1. Brooks' Statements and Testimony

Brooks was one of the State's witnesses. He gave a number of statements, not all of which are consistent, during the course of the investigation and subsequent trials related to the fire at the school.

Three or four months after the fire, Brooks spoke to Detective Sam Hanna about the fire. Initially, Brooks said he was in a pool hall and heard Julian and Rider talking about their involvement in the fire. In August 2002, Brooks gave a deposition and stated Julian had not implicated himself regarding the fire during the conversations at the pool hall, although Rider had. In February 2003, Brooks gave a second deposition. In that deposition, Brooks said the conversation had not taken place at the pool hall but elsewhere. He stated he sold Julian and Rider marijuana in the school's parking lot on the night of the fire. At Julian's trial in March 2003, Brooks again testified he sold Julian and Rider marijuana in the school's parking lot on the night of the fire.

In May 2003, after Julian's trial, Brooks told Detective Hanna he had been inside the school the night of the fire and had tried to open the safe. He stated he left when Julian and Rider went to get a torch. Finally, in February 2004, at Rider's trial, Brooks testified he did not participate in the burglary and arson, and he had lied in all of his previous statements and testimony in an attempt to get consideration on his pending cases.

2. Julian's Discovery Requests and Brooks' Criminal History

On May 31, 2002, Julian requested "specific discovery of the criminal record, including pending charges of all State's witnesses including, but not limited to, Jeffery Scott Brooks." (Defendant's Exhibit N.) Julian made additional requests for the same

information. Brooks' criminal case history provided by the State[5] indicates Brooks was charged with carrying a handgun without a license in December 1997 under Cause No. 48C01-9712-CF-267, and found guilty.[6] (State's Exhibit 7.) He was sentenced on June 6, 2001 to "Prison: 3 Years [/] Suspended: 3 Years [/] Probation: 3 Years" and given five days of jail credit. (*Id.*)

The Chronological Case Summary (CCS) for Cause No. 48C01-9712-CF-267 includes the following entry for June 6, 2001:

> 6/6/01 State appears by Michael Chambers. Defendant appears with counsel, Ronald Fowler. Sentencing hearing held. Defendant having plead [sic] guilty to Count I, Carrying a Handgun Without a License, Class C Felony, the defendant is sentenced to three (3) years in the Indiana Department of Corrections [sic] all suspended, all but five (5) days executed which defendant gets credit for time served. Defendant given 5 days of pretrial detention credit. *Defendant's probation to commence at the conclusion of his in-home detention.* Cash bond ordered released less cost of this action and first months [sic] probation fee and initial fee.
>
> Costs vs Defendant
> Judgment

(Defendant's Exhibit W) (emphasis supplied). The CCS was not requested by or supplied to Julian prior to trial.

Brooks was deposed on August 7, 2002. The following colloquy occurred between Julian's counsel and Brooks:

> Q Mr. Brooks, I just have a couple of housekeeping questions that I need to ask. Have you ever been convicted of a criminal offense, sir?
> A Oh, yes, sir.

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[5] The State apparently provided this information twice. The criminal case histories are dated August 6, 2002 (one day before Brooks was deposed) and January 3, 2003, and are identical.
[6] Two other charges listed under the same cause number were dismissed.

Q Could you tell us what you've been convicted of?
A In '97, I was convicted of a handgun on school property, C felony. And let's see, '98, I was convicted of possession of marijuana, B misdemeanor. In '99 I was convicted of violation of probation, they gave me work release.
Q Was that for the marijuana, you were on probation for that?
A Yeah, I got put on probation for that. And then I got violation of probation, they gave me work release. I violated work release, *went to house arrest for two (2) years*. Violated the house arrested [sic] for two (2) years and then I got a year, do six (6).
Q And that was all on the marijuana?
A Yeah.
Q All right. Anything else?
A No, that's all.
Q Any juvenile record?
A No, I don't have one of those.
Q Anything pending?
A No.

(State's Exhibit 6 at 20-21) (emphasis supplied).

3. *Brady* Analysis

Julian must first establish the evidence at issue—the fact Brooks was on home detention on the day of the fire—was favorable to him because of its exculpatory or impeachment nature. The jury was aware Brooks had told the police several different stories. However, evidence Brooks was on home detention on the day of the fire and could not have been in the school parking lot would have further eroded the credibility of that key witness. We conclude this evidence was favorable to Julian.

Julian must also establish this evidence was suppressed by the State, either willfully or inadvertently. Brooks' home detention did not appear on the criminal history run by the Madison County Sheriff's Department, but it was within the knowledge of the State because it was in the city court records. "The availability of information is not

measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." *Carroll v. State*, 740 N.E.2d 1225, 1229 (Ind. Ct. App. 2000) (quoting *Crivens v. Roth*, 172 F.3d 991, 998 (7th Cir. 1999), *reh'g denied*), *trans. denied* 753 N.E.2d 6 (Ind. 2001).

The State argues the evidence was not suppressed because the information was available to Julian through the exercise of reasonable diligence. It asserts: "Julian had all the material necessary to discover the evidence he claims the State suppressed." (Br. of Appellant at 6.) The State argues the combination of Brooks' deposition testimony he was on home detention for two years after a 1999 violation of his probation and the criminal history provided to him "put Julian on notice that Brooks may have been on home detention at the time [of the fire]." (Br. of Appellant at 6.) Even if Julian was "on notice" Brooks may have been on home detention after his deposition, Julian exercised reasonable diligence when he made repeated requests for Brooks' criminal history after the deposition. The State's failure to provide a complete criminal history amounts to suppression of this information for *Brady* purposes.

Finally, Julian must establish the evidence was material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Prewitt*, 819 N.E.2d at 402. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

There is a reasonable probability the result of the trial would have been different if Julian had been made aware Brooks was on home detention the night of the fire. The evidence most favorable to the post-conviction court's ruling indicates Brooks was in his

home several miles from the school and did not violate his home detention during the relevant time. Consequently, Brooks could not have sold marijuana to Julian at the school shortly before the fire. Although other evidence and testimony placed Julian at the scene,[7] this evidence is sufficient to undermine our confidence in the outcome of the trial.

We conclude Julian's claim under *Brady* prevails and, accordingly, affirm the court's grant of post-conviction relief.

Affirmed.

MATHIAS, J., and NAJAM, J., concur.

[7] Four inmates at the Madison County Jail testified Julian made incriminating statements while being held there. These witnesses recanted their testimony at Rider's trial. A fifth witness, who was in jail at the time of his deposition, testified Julian told him about the fire while in Florida. One piece of physical evidence linked Julian to the scene. Red fibers were found on the top of a security gate in the school that the perpetrators had climbed over. These fibers were similar to those taken from a shirt Julian owned.